No. 77-1293

In the Supreme Court of the United States

OCTOBER TERM, A.D. 1977

JAMES AUGUSTUS PETERSON, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, James Augustus Peterson, Sr., prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on December 13, 1977.

Opinion Below

The opinion of the Court of Appeals is unpublished.

Jurisdiction

The judgment of the Court of Appeals was entered on December 13, 1977. A timely Petition for Rehearing was filed, and was denied on February 15, 1978. The jurisdiction

of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented for Review

Whether the use by the Government of a grand jury witness and the subpoena issued to that witness, to bait the petitioner into committing the offense of obstruction of justice was such outrageous conduct on the part of the Government as to require the suppression as evidence of the statements made by the petitioner and/or the acquittal of the Petitioner under this Court's supervisory powers.

Statement of the Case

Petitioner James A. Peterson was charged in a single count indictment with obstructing justice, a violation of Title 18, United States Code, Section 1503. The indictment, returned on August 5, 1976 in the United States Distric Court for the Northern District of Indiana, alleged in substance that in and about September, 1975, to the date of the return of the indictment, a grand jury empaneled and sworn in the United States District Court for the Northern District of Indiana was conducting investigations into possible illegal gambling activities, and that one William Frank Newman had been subpoenaed as a witness before that grand jury.

The indictment further charged that on or about January 8, 1976, and on or about January 27, 1976, James Peterson endeavored to influence William Newman to falsely testify before the grand jury that, "Peterson had nothing to do with Newman's gambling operation; that Newman could not recall the substance of conversations he had had with Peterson; that Newman gave no percentage of the proceeds of Newman's gambling operation to

Peterson; and that Newman had no knowledge of payments to local police officials."

Peterson entered a plea of not guilty to the charge. Prior to trial he filed a motion to suppress as evidence certain conversations between him and William Frank Newman, including conversations of January 8 and January 27, 1976, which had been recorded by government agents. As grounds for the motion, Peterson contended that the use of a grand jury subpoena by a government informant at the instruction of government agents, to induce a discussion of the informant's pending grand jury appearance, constituted an abuse of the grand jury process, and prosecutorial misconduct and that the resultant conversations should therefore be suppressed.

An evidentiary hearing was held on the motion to suppress. The trial court in memorandum opinion found that the government's use of the grand jury subpoena was improper, but denied the motion to suppress the conversations. The trial court's opinion is printed at App. 1.

Peterson then filed a motion to dismiss the indictment, on the ground that the government's use of Newman as an informant had violated United States Department of Justice guidelines. That motion was also denied.

A trial was then had before the Honorable Phil M. McNagy, and a jury, and Peterson was found guilty on the single count of the indictment. His post-trial motions were denied, and he was sentenced to the custody of the Attorney General for a period of nine months.

The testimony adduced at the evidentiary hearing on Peterson's motion to suppress is summarized in the memorandum decision of the District Court denying the motion.

In substance, the evidence showed that one William Newman, an old friend of James Peterson, was approached by F.B.I. Special Agent Kenneth Freas while incarcerated in the East Chicago Indiana jail, and questioned about his knowledge of gambling activities in Lake County, Indiana. At this time James Peterson was already a target of the grand jury investigation.

Shortly after this initial contact by the government, and after he had been released from jail, Newman agreed to become a government informant. Newman received approximately $900 per month from the government from November, 1975, to the time of trial.

Freas had several subsequent meetings with Newman, and it was arranged that Newman would be "wired" with an hidden recording device, and would engage defendant Peterson in conversations concerning gambling in Lake County.

On September 16, 1975 and on September 23, 1975, conversations between Newman and Peterson were recorded by the government. Transcripts of these conversations were introduced into evidence at trial as Government Exhibit 4(d), and Government Exhibit 5(d), respectively.

Freas said that he was satisfied with the "excellent" information he had acquired from Newman's two recorded conversations with Peterson.

On December 22, 1975, agent Freas caused a subpoena to testify before the grand jury to be issued to William Newman. The subpoena was served upon Newman by Agent Freas on December 23, 1975. On January 8, 1976 Freas again wired Newman, and instructed him to take the grand jury subpoena to Peterson and to engage him in conversation about it.

Freas testified that the purpose of instructing Newman to show the subpoena to Peterson was to "stimulate" a conversation about the subpoena. A transcript of that conversation was introduced at trial as Government's Exhibit 6(d).

The Department of Justice strike force attorney handling the investigation did not know about the proposed use of the subpoena by Newman prior to the time that the talks occurred.

On January 27, 1976, Newman was again wired, and again sent to engage Peterson in another conversation concerning his appearance before the grand jury. Freas instructed Newman to show Peterson a letter he had received, continuing his appearance before the grand jury. A transcript of that conversation was introduced at trial as Government Exhibit 7(c).

During the course of the hearing on the motion to suppress, Newman said that during his conversation with Peterson on January 8th, Peterson advised him that he should obtain an attorney, and that he could stand on his rights under the Fifth Amendment. He said that he could not recall anything else said to him during the conversation.

Newman said that when he returned to visit Peterson on January 27, 1976, they discussed his problems in opening his gambling establishment.

The testimony adduced at the trial tended to prove that the petitioner did the acts charged in the indictment. The petitioner did not testify or introduce any evidence in his own behalf.

Reasons for Granting Writ

This case presents a question which has remained unresolved since this Court's judgment in *Hampton* v. *United State,* 425 U.S. 489, 96 S. Ct. 1646, and presents a conflict with a line of decisions in the Eighth Circuit, most notably *United States* v. *Reifsteck* (8 Cir. 1976), 535 F.2d 1030, and the Second Circuit *United States* v. *Archer* (2 Cir. 1973), 486 F.2d 670. That question is whether the entrapment defense ought to be limited only to those cases in which there is no predisposition on the part of the defendant to commit the offense or whether in the words of Mr. Justice Powell, concurring in *Hampton* whether "Government over-involvement in areas outside contraband offenses" may be sufficient to constitute a denial of due process requiring the federal courts to exercise their supervisory power by acquitting defendants who have been the target of such over-involvement.

A majority of the *Hampton* court seemed to accept this as a statement of law although a different majority voted to affirm the conviction and therefore there has been no controlling decision of this court in such cases.

The majority in *Hampton* did seem to agree upon a test formulated variously as "the outrageousness of police behavior in light of the surrounding circumstances" in the words of Mr. Justice Powell, or "the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to invoke such a defense might be 'predisposed' ", with words of Mr. Justice Brennan.

In *Sorrels* v. *United States,* 287 U.S. 435 (1932), this Court recognized that the defense of entrapment was

available in the federal courts. As refined in subsequent cases, the defense is available where the alleged offense is the product of the creative activity of law enforcement authorities, and a predisposition on the part of the defendant to have committed the crime is not established. See, *United States* v. *Russell,* 411 U.S. 423 (1973).

Here, the criminal offense with which the defendant was charged was virtually created by the government. The government issued the grand jury subpoena to Newman, instructed him to show the subpoena to Peterson, and to engage him in a conversation about the subpoena. The government's admitted purpose in doing so was to "stimulate" a discussion of Newman's impending grand jury appearance. By the government's own admission, it set out to "stimulate" the conversation which resulted in the offense of obstructing justice.

Further, examination of the transcript of Newman's conversation with Peterson on January 8, 1976 shows that Newman, acting as a government agent, himself induced the conversations about the subpoena. When Newman showed the subpoena to Peterson on January 8, Peterson initially only advised Newman to obtain an attorney:

> ". . . this is my advice, is ta . . . don't talk to 'em until ya get ya a lawyer. When they come back as the person, you got your subpoena then the next thing you gonna do you gonna talk to a lawyer.
>
> • • •
>
> "An that's your best advice."

Only after Newman persisted in his conversation with Peterson did Peterson make the statements which, the government contended at trial, constituted the offense of obstruction of justice. The fact that Peterson initially advised Newman to seek legal advice is clear proof that he had no predisposition to obstruct justice.

The government not only manufactured the opportunity for the alleged offense to occur, by providing Newman with a subpoena and instructing him to discuss it with Peterson, but through its informer Newman pressed the conversation, after Peterson initially advised Newman to obtain an attorney, until the subject of the subpoena was again reached and the resulting conversation which the government contended was an endeavor by the petitioner to obstruct justice.

It is in respect to the grand jury and its function that the outrageousness of the government's conduct is made apparent.

The primary purpose of a federal grand jury is to indict persons suspected of having committed crimes. This is, in fact, the only purpose of the grand jury specified in the Constitution. The grand jury has, of course, broad investigative powers so that it may seek information bearing on its decision whether to indict. See *Blair* v. *United States*, 250 U.S. 273 (1919); *United States* v. *Dionisio*, 410 U.S. 1 (1973).

Yet the historical function of the grand jury as a buffer between the citizen and his government continues. The grand jury is,

> "a primary security to the innocent against the hasty, malicious and oppressive prosecution . . . serving the individual function in our society of standing between the accuser and the accused." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962).

A prosecutor thus may not use a grand jury, and its processes, as his private investigative tool, *United States* v. *Fisher*, 455 F.2d 1101, 1105 (2d Cir. 1972); and abuses of the grand jury process are not tolerated. *Hale* v. *Henkel*,

201 U.S. 43, 65 (1906) ("Doubtless abuses of this power may be imagined . . . but were such abuses called to the attention of this Court, it would doubtless be alert to repress them."). See also, *United States* v. *Dionisio*, supra, 410 U.S. at 12.

The instant case presents a clear instance of the prosecution misusing grand jury processes for its own purposes. Here there was an ongoing grand jury investigation into illegal gambling activities in Lake County, Indiana. The government, through F.B.I. Agent Kenneth Freas, enlisted one William Newman as a paid informant, and on two occasions in September, 1975, had him wired with a transmitter and recorder, and instructed him to engage James Peterson in conversations concerning gambling in Lake County.

In January, 1976, Agent Freas had a grand jury subpoena issued to William Newman. Admittedly, Newman had knowledge of matters relevant to the inquiry of the grand jury, and the issuance of the subpoena itself is not challenged. However, after the issuance of the subpoena, the government outrageously abused the process of the grand jury. Agent Freas, without the knowledge or permission of Department of Justice strike force attorney handling the grand jury investigation, again wired Newman, gave him the subpoena, and instructed him to take the subpoena to Peterson and engage him in a conversation about his coming grand jury appearance.

As admitted by Agent Freas, the purpose of instructing Newman to show the subpoena to Peterson was to "stimulate" a conversation about the subpoena, and Newman's impending appearance before the grand jury.

The grand jury subpoena was thus not used for its proper and intended purpose of compelling the appearance before the grand jury of one with knowledge relevant to its inquiry. Rather, it was used as a tool of the prosecution, in this instance to literally create the offense of obstructing justice.

Yet the government was not content with a single abuse of the grand jury subpoena power. After the conversation of January 9, 1976 between Peterson and Newman, Newman received a letter from the government advising him that his appearance before the grand jury was continued to late January, 1976. On January 27, 1976 Agent Freas again wired Newman, and instructed him to show the letter continuing his grand jury appearance to Peterson and to engage him in another conversation relating to his pending appearance.

The trial court itself recognized that the government abused the grand jury process with its practices. Although denying the defendant's motion to suppress as evidence the conversations of January 8 and January 27 between Peterson and Newman, the Court said:

> "This court is of the opinion that the grand jury subpoena should not have been used by the United States as bait in order to encourage the defendant Peterson to comment on matters then pending before the grand jury."

Other courts have also recognized that an abuse of process occurs when the prosecution uses a grand jury as a private investigative tool. In *Durbin* v. *United States,* 221 F.2d 520 (D.C. Cir. 1954), a United States Attorney caused a grand jury subpoena to be served upon a defendant. When the defendant appeared as required by the subpoena he was not taken before the grand jury, but rather was questioned in the office of the United States Attorney. In reversing his subsequent conviction the Court said, at 221 F.2d 522,

> "It was clearly an improper use of the District Court's process for the Assistant United States Attorney to issue a grand jury subpoena for the purpose of conducting his own inquisition."

In *In re September, 1971 Grand Jury,* 454 F.2d 580, 585, the United States Court of Appeals for the Seventh Circuit held that it would be an abuse of the grand jury process "for the Government to impose on that body to perform investigative work that can be, and heretofore has been successfully accomplished by the regular investigative agencies of Government."

Clearly there was an abuse of grand jury process, and the District Court so found. Yet the District Court declined to suppress as evidence the conversations induced by that abuse of process, characterizing the issue as whether the abuse of the subpoena amounted to a "breach of fundamental fairness."

It is respectfully submitted that once the District Court found an abuse of process, it erred in refusing to suppress the conversations of January 8 and January 27. Numerous cases from this Court have recognized that the federal district courts must supervise the grand juries sitting in their jurisdiction. *Hale* v. *Henkel,* 201 U.S. 43, 65 (1906) (courts "would doubtless be alert to repress" abuses); *Hoffman* v. *United States,* 341 U.S. 479, 485 (1951); *United States* v. *Dionisio,* 410 U.S. 1, 12 (1973). A grand jury subpoena is the process by which the grand jury fulfills its investigative function, and as a process of the district court lies within the ambit of federal court supervision.

As such, the district court has the power, and in fact the duty, to tailor a remedy where an abuse of that process has occurred.

The suppression of the conversations of January 8 and January 27 was the minimal and proper remedy for the government's abuse of process. Clearly in the instant situation, the Petitioner was not in a position to seek to quash the subpoena served upon Newman prior to its misuse. He was able to bring the abuse of process to the attention of the Court only after it had been revealed during the course of pretrial discovery that the subpoena has been used to bait him into an alleged criminal offense.

By refusing to suppress the conversations induced by the subpoena, the district court permitted the government to profit from its transgressions. This is a result contrary to a long succession of decisions refusing to permit the prosecution to profit from its wrongs. See, e.g., *Weeks* v. *United States,* 232 U.S. 383 (1914); *McNabb* v. *United States,* 318 U.S. 332 (1943); *Wong Sun* v. *United States,* 371 U.S. 471 (1963).

Suppression of the statements of January 8 and January 27, the "fruits" of the government's abuse of process, was the minimum and proper remedy necessary to repress the government's abuse of the grand jury process, and to restore the integrity of this criminal proceeding.

Respectfully submitted,

CHARLES A. BELLOWS
Attorney for Petitioner

Appendices

APPENDIX 1.

Opinion of the District Court

On December 13, 1976, defendant, by counsel, Charles A. Bellows, filed motion to suppress certain conversations. An evidentiary hearing was held on the motion on January 3, 1977. For reasons hereinafter set forth, defendant's motion to suppress is DENIED.

The motion to suppress presents two main reasons why the conversations in question should be suppressed; (1) Use of a grand jury subpoena by an informant acting under instructions of government agents, thereby constituting abuse of federal grand jury process and prosecutorial misconduct; and, (2) That the informant was a willing witness before the grand jury prior to the time he talked to the defendant Peterson, which fact was known to the government, and thus the informant could not be influenced by anything that the defendant Peterson might say to him. The Court is of the opinion that a corollary of the second proposition is the argument that since the informant was a willing witness before the federal grand jury, the only purpose in having the witness converse with the defendant Peterson was to gather, perhaps a more apt word is "originate", evidence for possible charges against the defendant.

The evidence at the hearing developed the following facts: The informant, William Frank Newman, was arrested on state charges and was being held at the East Chicago City Jail. While in the East Chicago City Jail, he was interviewed by F.B.I. agent Kenneth G. Freas. At a later time, the informant Newman indicated he would cooperative with the F.B.I. in its ongoing investigation into gambling in Lake County, Indiana. It was arranged by the F.B.I. that the informant Newman would be "wired",

i.e. a hidden recording device would be attached to his body, and that a meeting would be arranged with the defendant Peterson at which time the subject of gambling would be brought up for discussion between the informant Newman and the defendant Peterson. Conversations were recorded that took place between the informant Newman and the defendant Peterson on September 16, 1975, and September 23, 1975. In the recorded conversation of September 23, 1975, among other things, the defedant Peterson suggested to the informant Newman that a grand jury was meeting in Hammond (p. 3); that he was told by a man to be patient concerning the raids until the grand jury was over (p. 6); that a lot of people were going to be subpoenaed because of the thing (grand jury) in Hammond and that he, Newman, might be one of them; that if he was asked what they were talking about it would always be trying to buy liquor, etc. (p. 11); that he (Peterson) would try to get him (Newman) a good front man and that he (Peterson) would tell them a lie (p. 12); that he (Newman) might get a subpoena and that he should not deny that he knows him (p. 13); and, that Newman should let him know if he gets a subpoena, that there would be no use in putting a front man out there now, and after that he (Newman) should stay away for a couple of weeks or a month (p. 14).

On December 22, 1975, a subpoena to testify before the grand jury was issued to William Frank Newman ordering him to appear before the grand jury on the 15th day of January, 1976; the subpoena was issued pursuant to application of the United States and it should be noted that the name "S.A. Gordon Freas" appears underneath the date of issuance. The return on the subpoena shows that it was served on William Frank Newman on December

23, 1975, by Special Agent Kenneth G. Freas. The informant William Frank Newman had another meeting with the defendant Peterson on January 9, 1976, at which time their conversation was recorded. It is not disputed that Special Agent Freas directed the informant Newman to show the subpoena to the defendant; Peterson; Special Agent Freas indicated that the purpose of telling the informant Newman to show the subpoena to the defendant Peterson was to "stimulate" the conversation between the two men. The testimony of S.A. Freas on this point is as follows:

> Q. That was the idea, wasn't it, to send him out with the subpoena and see what Peterson would say; isn't that right?
>
> A. I knew the subpoena would be shown to Mr. Peterson, I knew it would serve as a stimulus to conversation.
>
> Q. You mean there would be conversation about it?
>
> A. Yes.
>
> Q. You knew Newman was going to ask Peterson's advice about it, isn't that right?
>
> A. Not necessarily; I didn't say that.
>
> Q. Well, you expected Newman to ask Peterson for his advice?
>
> A. I expected Newman to show Peterson the subpoena.
>
> Q. Will you answer the question? Ask for his advice what to do; isn't that right?
>
> A. I don't recall giving him any such instruction, just show him the subpoena.

It appears that Attorney Charles Wehner, who was a member of the strike force of the Department of Justice handling this investigation, did not know about the proposed use of the subpoena by the informant Newman in his talks with defendant Peterson prior to the time the talks occurred. Attorney Wehner subsequently did learn

about the use of the subpoena in the conversations between informant Newman and defendant Peterson. The pertinent part of his testimony on this point is set forth below:

> Q. I didn't ask you that. I asked you whether or not the idea was to engage Peterson in a discussion about gambling?
> A. Yes, it was.
> Q. You intended to use that information which could be recorded in any proceedings against Mr. Peterson; right?
> A. The object was at that point in time purely to gather information.
> Q. And use it if necessary for the purpose of prosecuting Mr. Peterson?
> A. Yes, it could have been, yes.
> Q. Now, in addition to just getting information about gambling, it was also suggested to Newman, or Newman was instructed to take the Grand Jury subpoena and go to Mr. Peterson with it, am I correct?
> A. I believe he was. I didn't give those instructions. The instructions to Newman were provided by Agent Freas.
> Q. Did you know that Mr. Freas was going to instruct Mr. Newman to go to Mr. Peterson with the Grand Jury subpoena?
> A. I didn't know that. I knew Newman was given a subpoena prior to the wiring.
> Q. Are you telling me, Mr. Wehner, you didn't know that Newman was instructed to take the Grand Jury subpoena that he had received and go to Mr. Peterson with it and show it to him?
> A. He may have been, I don't know.
> Q. You are not aware of that?
> A. That is correct. Let me correct that to say I was not aware at that time. I believe after discussion with Agent Freas, I know now he was so instructed.
> Q. You now know it?
> A. Yes, at this time. At that time I did not.

There was a further meeting between the informant Newman and the defendant Peterson on January 27, 1976; the grand jury subpoena was not mentioned in that conversation.

A description of the investigative powers of a grand jury is set forth in *U.S.* v. *Calandra,* 414 U.S. 338, 38 L.Ed.2d 561 (1974):

> The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged.

The defendant Peterson is not here questioning the scope of the grand jury powers to examine into his alleged gambling activities. The defendant is here claiming that a grand jury subpoena issued in the name of the grand jury was improperly utilized for the purpose of developing a criminal charge against him.

This Court is of the opinion that the grand jury subpoena should not have been used by the United States as a bait in order to encourage the defendant Peterson to comment on matters then pending before the grand jury. As stated in *U.S.* v. *Fisher,* 455 F.2d 1101 (C.C.A.2d 1972), ". . . the grand jury is not meant to be the private tool of the prosecutor"; this could of course include the use of the legal process of the grand jury, namely the grand jury subpoena. Thus, in *Durbin* v. *U.S.,* 221 F.2d 520 (C.C.A. D.C. 1954), Judge Bazelon reversed a conviction and or-

dered the indictment dismissed because the Assistant United States Attorney had used a grand jury subpoena to cause a witness to appear at the office of the United States Attorney, where the witness's testimony was discussed, without ever calling the witness before the grand jury.

On the other hand, the question remains as to whether the use of the grand jury subpoena by the United States as set out in the facts hereinbefore recounted amounts to a sufficient transgression on the part of the law enforcement agents to justify suppressing the conversations. As this Court sees the issue, it is should the evidence be suppressed as a matter of fundamental fairness.

To begin with, there is no evidence in the record from which the court would be justified in concluding that the grand jury subpoena directed to William Frank Newman was not legally issued. It is true that the United States Attorney's Office has almost complete say-so over the issuance of such subpoenas, although technically issued under the auspices of the United States District Court, and it is necessary to keep this in mind when considering the possible dangers from abuses that can arise. *In Re Grand Jury Proceedings,* 486 F.2d 85 (C.C.A.3rd 1973). The evidence was to the effect that this was an ongoing grand jury which, among other things, was investigating gambling in Lake County. Certainly, the informant William Frank Newman was a witness that could be expected to appear before the grand jury and the evidence is to the effect that he did so on January 29, 1976. It is thus reasonable to conclude that the grand jury subpoena was issued for the purpose of directing William Frank Newman to appear before the grand jury: It makes no difference that an equally strong reason may have existed for the issuance

of the grand jury subpoena, i.e. that the subpoena would be shown to the defendant Peterson for the purpose of encouraging him to possibly incriminate himself.

The use of the grand jury subpoena in this instance cannot be said to violate any constitutional rights of this defendant. The question really involves whether the use of the grand jury subpoena in the way in which it was employed in this instance amounts to a breach of fundamental fairness. This Court is of the opinion that the true test to be applied is the one enunciated in *U.S.* v. *Russell,* 411 U.S. 423, 36 L.Ed.2d 366 (1973). The issue involved in that case was one of entrapment, which may possibly be a defense in this case. At the same time, the majority opinion recognizes, that the test to be applied is whether the law enforcement tactic used violated "fundamental fairness." Following a reading of the transcripts of the conversations that occurred on January 16, 1976, and January 27, 1976, the Court is satisfied that on applying such a test it would not be justified in suppressing the conversations.

The defendant has also raised the issue that since the informant had already given a full statement, he was not subject to being influenced by anything that the defendant said or did. This theory has been rejected in earlier cases. *U.S.* v. *Rosner,* 485 F.2d 1213, cert. den. 417 U.S. 950, 41 L.Ed.2d 672.

It should be kept in mind that this ruling in no way is meant to denigrate the defense of entrapment which is in all respects available to the defendant as a defense in this case.

Enter: January 10, 1977.

s/ Phil M. McNagny
Judge, United States District Court

APPENDIX 2.

Unpublished Order of the Court of Appeals

ORDER

James Augustus Peterson, Sr., defendant-appellant (hereinafter defendant or Peterson) appeals from a conviction on an indictment charging him with obstructing justice in violation of 18 U.S.C. § 1503. The indictment alleged that defendant corruptly endeavored to influence a witness, William Frank Newman, to testify falsely before a grand jury which was investigating illegal gambling and conspiracy by law enforcement officers to facilitate illegal gambling. The indictment further charged that defendant endeavored to influence Newman to testify falsely that: (1) defendant had nothing to do with Newman's gambling operation; (2) Newman could not recall the substance of conversations had with defendant; (3) Newman gave no percentage of the proceeds of his gambling operations to defendant, and (4) Newman had no knowledge of any arrangements with local police officers.

After entering a plea of not guilty, defendant filed a motion to suppress as evidence conversations between Newman and defenedant on January 8, and January 27, 1976. These conversations had been recorded by a hidden device attached to Newman's body. In his motion, defendant argued that the use of a grand jury subpoena by a government informant at the instruction of government agents, to induce a discussion of the informant's pending grand jury appearance constituted an abuse of the grand jury process and prosecutorial misconduct. The district court

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• The Honorable Wilson Cowen, Senior Judge of the United States Court of Claims, is sitting by designation.

held an evidentiary hearing on the motion and issued a memorandum opinion denying the motion to suppress. Defendant then filed a motion to dismiss the indictment on the ground that the government's use of Newman as an informant violated Department of Justice guidelines, and that motion was also denied.

The defendant's contentions present two principal issues for review. The first of these is that the government's use of a grand jury subpoena to induce conversation between the defendant and an informant concerning the informant's pending grand jury appearance was an abuse of the grand jury process and prosecutorial misconduct; therefore the trial court erred in refusing to suppress as evidence the conversations between the defendant and the informant which were induced by the grand jury subpoena. Defendant's second ground for reversal is that the evidence establishes as a matter of law that the defendant was entrapped into committing the offense with which he was charged.

The facts pertinent to the issues before us are summarized as follows: After the informant, Newman, had been arrested on State charges and was being held in the East Chicago City Jail, he was interviewed by FBI agent Freas. He agreed to cooperate with the FBI in its investigation of gambling in Lake County, Indiana. It was arranged that a hidden recording device would be attached to Newman's body, and that he would meet with defendant and discuss the subject of gambling. Recordings were made of conversations between the two on September 16, 1975 and September 23, 1975. In the first of these conversations, Newman told defendant that Newman had been arrested and his gambling place closed. Newman said he had talked about the matter with the commander and a sergeant of the East Chicago Indiana Police Department. They told

him that they could not give him permission to reopen his gambling establishment. Peterson replied he would speak with the police and tell them it was "okay with him" if Newman reopened his place. Peterson also stated that there had been more raids under the new police chief in 3 years than in the previous 20.

In the conversation of September 23, 1975, Peterson told Newman that a lot of people would be getting subpoenas from the grand jury, which was meeting in Hammond, Indiana; that Peterson would be seen talking with Newman who would be asked what the conversation was about. Peterson instructed Newman to state that in their conversations, Newman was trying to borrow money to obtain liquor on credit from Peterson. Defendant emphasized that Newman might get a subpoena and stated that he should not deny that he had talked with Peterson. Peterson also said that Newma would be asked whether Peterson helped Newman to operate the gambling establishment, and that Newman would have to say "no." He also stated that Newman should let him know if he received a subpoena.

On December 22, 1975, agent Freas caused a subpoena to be issued which required Newman to appear and testify before the grand jury on January 15, 1976. Agent Freas directed Newman to show the subpoena to the defendant, and in his testimony, the agent stated that the purpose of instructing Newman to show the subpoena to the defendant was to stimpulate a conversation about the subpoena. The Department of Justice strike force attorney in charge of the investigation did not know about the proposed use of the subpoena prior to the time that the conversation between Newman and the defendant occurred. On January 8, 1976, Newman again had a recorded conversation with defendant. Newman showed defendant the grand jury subpoena and at that time, defendant advised Newman what questions he would be asked by the grand jury and how he should respond. Peterson advised Newman that if he were questioned about who worked for him in the gambling operation, Newman was to say he had "fellows hustling" and that Newman did not share the proceeds of the gambling business with anyone; that Newman should testify that he did not pay police or anyone else anything; that Newman would be asked about defendant and whether he or the police got a share of the proceeds, and that Newman should testify that he knew nothing about it. Newman should not deny that he talked with defendant, but he was to say that he could not remember what the conversations were about.

Newman appeared at the meeting place of the grand jury on January 15, 1976 and was recalled for January 29, 1976. On January 27, 1976, he again consented to having his conversation with defendant monitored and recorded. During that conversation, defendant told Newman that if the latter were asked if he was paying money to the police, Newman had many good reasons to reply that he was paying nobody. The defendant also said that since Newman had been raided many times, he should say that if he had given the police any money, he would not have been raided.

Newman testified before the grand jury on January 29, 1976 and again on March 23, 1976. The government's evidence at defedant's trial consisted primarily of Newman's testimony and the recorded conversations between Newman and defendant.

In the memorandum opinion denying defendant's motion to support, the district court stated that the grand jury subpoena should not have been used by the United States

"as a bait to encourage the defendant, Peterson, to comment on matters then pending before the grand jury." The court nevertheless reached the following conclusion:

> • • • The evidence was to the effect that this was an ongoing grand jury which, among other things, was investigating gambling in Lake County. Certainly, the informant William Frank Newman was a witness that could be expected to appear before the grand jury and the evidence is to the effect that he did so on January 29, 1976. It is thus reasonable to conclude that the grand jury subpoena was issued for the purpose of directing William Frank Newman to appear before the grand jury: It makes no difference that an equally strong reason may have existed for the issuance of the grand jury subpoena, i.e. that the subpoena would be shown to the defendant Peterson for the purpose of encouraging him to possibly incriminate himself.

Although a court has power to correct an abuse or a misuse of grand jury process, we find that the distrct court's denial of the motion to suppress here did not constitute reversible error. *Durbin* v. *United States,* 221 F.2d 520 (D.C. Cir. 1954), upon which defendant relies is inapposite. In that case, the grand jury subpoena was improperly used to provide the U. S. Attorney an opportunity to coerce the defendant, who was later indicted and convicted. At the direction of the U.S. Attorney, the defendant in that case was taken to the office of the U.S. Attorney and there questioned, but was never taken before the grand jury. The court found that the subpoena there was used to restrain the defendant's movements indefinitely or until he made a statement which was satisfactory to the Assistant U.S. Attorney, and this was done despite the fact that the grand jury had recessed. Here, as the district

court found, the subpoena was directed to Newman, a legitimate witness, rather than to the defendant. Newman was under process to testify before the grand jury and he did appear and gave relevant testimony. His appearance was a necessary step in the investigation conducted by the grand jury and the subpoena was appropriately issued to secure his appearance.

We also reject the entrapment defense, which defendant advances as a ground for the reversal of his conviction. As stated in *Sorrells* v. *United States,* 287 U.S. 435, 448 (1932), the entrapment defense prohibits law enforcement officers from instigating a criminal act by persons "otherwise innocent to lure them to its commission and to punish them." That case was reaffirmed by the Supreme Court in the recent case of *United States* v. *Russell,* 411 U.S. 423 (1973), which held, among other things, that the principal element in the defense of entrapment is the defendant's predisposition to commit the crime. As summarized above, the facts of this case clearly show a predisposition on the part of the defendant to commit the crime for which he was convicted. Specifically, in the recorded conversation of September 23, 1975, the defendant made statements which, without more, establish such a predisposition. Moreover, as this court has held "mere solicitation is not enough to show entrapment." *United States* v. *Perry,* 478 F.2d 1276, 1278 (7th Cir. 1973), *cert. den.* 414 U.S. 1005 (1973). Entrapment is an affirmative defense and "the defendant must come forward with evidence of nonpredisposition and government inducement." *United States* v. *Hermosillo-Nanez,* 545 F.2d 1230, 1232 (9th Cir. 1976). In this case, the defendant failed to meet that burden.

For the foregoing reasons, the conviction of the defendant is hereby affirmed.

No. 77-1293

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES AUGUSTUS PETERSON, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8-13) is unreported. The opinion of the district court denying petitioner's motion to suppress (Pet. App. 1-7) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1977, and a petition for rehearing

was denied on February 15, 1978. The petition for a writ of certiorari was filed on March 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the fact that a government agent suggested to a cooperating grand jury witness that he show his subpoena to petitioner required either petitioner's acquittal on the charge that he obstructed justice by directing the witness to lie to the grand jury or the suppression of petitioner's conversations with the witness.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of endeavoring to obstruct justice, in violation of 18 U.S.C. 1503. He was sentenced to nine months' imprisonment. The court of appeals affirmed (Pet. App. 8-13).

1. The indictment alleged that petitioner sought to influence a witness, William Frank Newman, to testify falsely before a grand jury investigating illegal gambling and conspiracy by law enforcement officers to facilitate illegal gambling. According to the indictment, petitioner attempted to have Newman supply the following false information: (1) that petitioner had nothing to do with Newman's gambling operation; (2) that Newman could not recall the substance of conversations he had with petitioner;

(3) that Newman gave no percentage of the proceeds of his gambling operations to petitioner; and (4) that Newman had no knowledge of payments to local police officials.

The government's evidence at trial showed that Newman, an employee of petitioner for many years (Tr. 88), had run two successive gambling businesses since 1970 (Tr. 91-99). Newman had opened each of these businesses after receiving petitioner's permission to operate (Tr. 92, 96-97) and had paid petitioner $150 a month, pursuant to an agreement (Tr. 74, 77). Petitioner ultimately became Newman's partner in the second establishment, opened in August 1974; thereafter, petitioner and Newman divided the proceeds equally (Tr. 98).

In August 1975, after Newman stopped operating the gambling business because of raids by the police, he talked to petitioner about reopening the business (Tr. 95-100). That same month, Newman began cooperating with the Federal Bureau of Investigation (F.B.I.) (Tr. 253-254). He agreed to let the F.B.I. monitor and record his conversations with petitioner (Tr. 101-102, 105-106), and four such conversations were recorded.[1]

The first of these conversations occurred on September 8, 1975. It primarily concerned the closing of Newman's gambling operation, and his own and

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[1] Government Exhibits 4(d), 5(d), 6(d) and 7(c) are the verbatim typewritten transcripts of the conversations, or portions of the conversations, which were introduced into evidence at trial.

petitioner's attempts to have it reopened (Gov. Ex. 4(d)). The second conversation took place on September 23, 1975. At that time petitioner, who had apparently learned of the special grand jury inquiry then being conducted into gambling, told Newman that numerous people would be receiving subpoenas and that Newman might receive a subpoena and be asked about petitioner (Gov. Ex. 5(d), p. 1). Petitioner then told Newman how to testify before the grand jury (Gov. Ex. 5(d), pp. 1-3) and how to get back into the gambling business (Gov. Ex. 5(d), pp. 2-3); he also stated that he would begin paying the police chief for permission to reopen (Gov. Ex. 5(d), p. 6). Petitioner told Newman to let him know if Newman received a subpoena (Gov. Ex. 5(d), p. 4).

The third recorded conversation occurred on January 8, 1976, after Newman had been served with a subpoena to testify before the grand jury on January 15, 1976 (Tr. 317). At the start of this conversation, Newman showed petitioner the grand jury subpoena (Gov. Ex. 6(d), pp. 1-2). Petitioner commented that "Smiley" had also received a subpoena; that Newman's subpoena was "the same one they all got"; and that his advice was "don't talk to 'em until ya get ya a lawyer" (*ibid*). Petitioner and Newman then discussed the gambling business.

Later, petitioner returned to the subject of the subpoena. He told Newman that he would be questioned about the gambling operation and those persons who worked for him; that Newman should say that

he had "fellows hustling there" and that he did not share the proceeds of the business with anyone (Gov. Ex. 6(d), pp. 14-16); that he should testify that he "don't pay nobody" and that he never gave any policeman anything (Gov. Ex. 6(d), p. 17); that when asked about petitioner and whether petitioner or the police got a share of the proceeds, Newman should testify that he knew nothing about it (Gov. Ex. 6(d), p. 19); that Newman should say that he never got started in the business because he was raided every time he tried to open (Gov. Ex. 6(d), pp. 19-20); and that Newman should not deny talking to petitioner but should say that he could not remember the contents of the conversations (Gov. Ex. 6(d), pp. 21-22).

Newman later received a letter informing him that his grand jury appearance was postponed from January 15 to January 29, 1976 (Tr. 83-84). When Newman showed this letter to petitioner during their final recorded conversation, on January 27, 1976 (Gov. Ex. 7(c), pp. 1-2), petitioner again told Newman that he would be asked if he were paying the police any money and that Newman had many reasons to say that he was paying nobody (Gov. Ex. 7(c), p. 5).

Newman testified before the grand jury on January 29, 1976, and again on March 23, 1976.

2. Prior to trial, petitioner moved to suppress the two January conversations recorded after issuance of the subpoena. He claimed that there had been an abuse of the grand jury process and prosecutorial

misconduct, alleging that Newman had used the grand jury subpoena, at the instruction of government agents, to induce a discussion of Newman's pending grand jury appearance.

At an evidentiary hearing, F.B.I. agent Freas, who had been Newman's primary government contact from the time that he became a cooperating witness, testified that he obtained the subpoena summoning Newman to appear before the grand jury (Jan. 3 S. Tr. 51).[2] The agent stated that he subsequently told Newman to show the subpoena to petitioner if the opportunity arose (*id.* at 52), and that he expected the subpoena to serve as a stimulus to conversation (*id.* at 53). Regarding the January 27, 1976, conversation, Freas testified that Newman was to engage petitioner in a conversation about gambling and also about Newman's forthcoming appearance before the grand jury (Jan. 3 S. Tr. 58). However, Freas denied that the object was to find out what petitioner would tell Newman to do concerning the subpoena, and he stated that he did not instruct Newman to ask petitioner's advice concerning it (*id.* at 53-54). He said that it was his intention to have Newman testify before the grand jury when he served him with the subpoena, that the investigation into gambling and police corruption was an ongoing one, and that he would have sent Newman out for conversations with petitioner on the two January occasions whether or not Newman had received a subpoena (*id.* at 58-59).[3]

[2] This reference is to the supplemental transcript of the January 3, 1977, evidentiary hearing, which contains the testimony of Newman and agent Freas. "Jan. 3 Tr." refers to the main transcript of that hearing.

Newman and the Strike Force attorney who had handled the investigation were also called as witnesses by petitioner. Newman confirmed that he was told to show the subpoena to petitioner, but he said that he was not instructed to ask for advice (Jan. 3 S. Tr. 22). He had previously been instructed to talk with petitioner about the gambling business (*id.* at 13). The Strike Force attorney testified that all instructions to Newman were given through agent Freas (Jan. 3 Tr. 21, 22) and that he had suggested to Freas that Newman be told to discuss gambling operations with petitioner (*id.* at 10, 12). He stated that the object of the "wiring" was purely to gather information (*id.* at 13) and that Freas was not told to tell Newman to seek advice from petitioner (*id.* at 15).

The district court denied the motion to suppress (Pet. App. 1-7). Although it believed that the "subpoena should not have been used by the United States as a bait in order to encourage [petitioner] to comment on matters then pending before the grand jury" (Pet. App. 5), it found that it was "reasonable to conclude that the grand jury subpoena was issued

[3] At trial, Freas further explained that the subpoena for Newman was obtained with the knowledge and approval of the Strike Force attorney handling the investigation (Tr. 374) and that he expected the subpoena would serve as a stimulus to conversation by petitioner concerning gambling and police corruption (Tr. 383).

for the purpose of directing William Frank Newman to appear before the grand jury" (Pet. App. 6). Since petitioner's constitutional rights had not been violated, the court viewed the issue as whether suppression was required as a matter of fundamental fairness. Based, *inter alia*, on its reading of the January transcripts, the court concluded that suppression would not be justified. The court of appeals affirmed (Pet. App. 8-13).

ARGUMENT

Petitioner contends that the government improperly used Newman and the grand jury subpoena to bait him into attempting to influence Newman's grand jury testimony. He further says that this alleged activity constituted "outrageous conduct" requiring either his acquittal under the exercise of this Court's supervisory powers or the suppression of the January conversations. These claims are without merit.

1. Although petitioner asserts that this case presents an unresolved issue concerning the entrapment defense,[4] his principal claim seems to be that his

[4] While petitioner suggests (Pet. 6) that this case affords an opportunity to resolve "whether the entrapment defense ought to be limited only to those cases in which there is no predisposition on the part of the defendant," that suggestion is incorrect because that question has already been authoritatively resolved. In *United States* v. *Russell*, 411 U.S. 423, this Court reaffirmed that the defense of entrapment is unavailable to a defendant predisposed to commit the crime. *Id.* at 433, 436. That view was sustained in *Hampton* v. *United States*, 425 U.S. 484. In his concurring opinion, relied upon by petitioner, Justice Powell specifically agreed with the plurality that "*Russell* definitively construed the defense of 'entrapment' to be focused on the question of predisposition." *Id.* at 492 n. 2.

Nor do the decisions in *United States* v. *Reifsteck*, 535 F.2d 1030 (C.A. 8), and *United States* v. *Archer*, 486 F.2d 670 (C.A. 2), reflect any conflict or confusion about the limits of the entrapment defense. In both cases, the courts recognized that the traditional entrapment defense is restricted to instances where the defendant is not predisposed to commit the crime. They noted only that this Court has not foreclosed the possibility of a distinct defense based solely on due process notions, which the *Reifsteck* court termed "entrapment as a matter of law." 535 F.2d at 1034-1035. Here, the court of appeals correctly concluded that the recognized entrapment defense was unavailable to petitioner because "the facts of this case clearly show [his] predisposition * * * to commit the crime for which he was convicted" (Pet. App. 13).

conviction on these facts violates general principles of due process. In his view, this case apparently presents circumstances "in which the conduct of law enforcement officials is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, cf. *Rochin* v. *California*, 342 U.S. 165 (1952) * * *." *United States* v. *Russell*, 411 U.S. 423, 431-432. See also *Hampton* v. *United States*, 425 U.S. 484, 489. But whatever may be the ultimate scope of this due process defense, it is plain that it has no application to the facts of this case.

The evidence in the present case shows no egregious overreaching by government officials; at most, the agents gave petitioner a convenient opportunity to commit an offense, an opportunity that he rapidly

seized. The primary purpose in serving Newman with the subpoena was to secure his appearance and testimony before the grand jury (Tr. 393). Although the agent also told Newman to show the subpoena to petitioner if the opportunity arose, that instruction was a proper method to stimulate further discussion of illegal gambling and police corruption, the matters under investigation (Tr. 383, 393). The first two recorded conversations had developed such information, and the thrust of the investigation did not change when Newman was subpoenaed. While the agent recognized that petitioner might also discuss with Newman his possible conduct before the grand jury, the incitement of such a conversation was not an overriding purpose of the subpoena but merely a conceivable by-product of its display.[5]

Even if the conduct of the government agents were thought improper, their involvement in the criminal activity was slight. In showing the subpoena to petitioner, Newman was following both past practice between the two men (Tr. 149, 152) and petitioner's own instructions in the September 23 conversation. There is no reason to suppose that petitioner would

[5] Although petitioner seems to suggest that Newman's grand jury appearance was postponed to provide an opportunity for a second discussion concerning the subpoena (Pet. 10), there is no support for this claim. Newman did appear at the meeting place of the grand jury on January 15, 1976 (Tr. 83-84). He apparently was one of at least six witnesses who had been subpoenaed for that date; three seem to have testified that day, and three, including Newman, were asked to return at a later date (Gov. Ex. 7(c), pp. 2-3).

have refrained from obstruction of justice if he had not seen the subpoena but merely had been told that Newman was to appear before the grand jury. Indeed, since it has long been established that a "witness" for purposes of 18 U.S.C. 1503 need not be subpoenaed (see, *e.g.*, *United States* v. *Griffin*, 463 F.2d 177 (C.A. 10), certiorari denied, 409 U.S. 988; *Walker* v. *United States*, 93 F.2d 792 (C.A. 8)), the action of the government in issuing a subpoena to Newman did not even supply a necessary element of petitioner's offense. Cf. *Hampton* v. *United States*, 425 U.S. 484.

This Court has upheld a conviction on similar facts in *Osborn* v. *United States*, 385 U.S. 323. There, in a prosecution for obstruction of justice based on attempted jury tampering, efforts by the defendant to bribe a juror were precipitated by the statement of a government informant that he was related to one of the jurors. The informant later falsely told the defendant that the juror was "susceptible to money" (385 U.S. at 326). Affirming the conviction despite a claim of entrapment, this Court noted that "[a]t the most, [the informant's statements] afforded the petitioner 'opportunities or facilities' for the commission of a criminal offense." 385 U.S. at 331-332.

2. As noted earlier, the district court, in denying petitioner's suppression motion, stated that the subpoena should not have been used as a "bait to encourage [petitioner] to comment on matters then pending before the grand jury" (Pet. App. 5). Peti-

tioner contends that the court thus found an abuse of process and that, having done so, it erred in refusing to suppress the January conversations. The court of appeals correctly rejected this claim.

Even if there had been an abuse of grand jury process in this case, 18 U.S.C. 3501 would preclude the courts from remedying that abuse by suppression of petitioner's inculpatory statements. *United States* v. *Di Gilio*, 538 F.2d 972, 985 (C.A. 3), certiorari denied *sub nom. Lupo* v. *United States*, 429 U.S. 1038. In any event, there was no abuse of process in this case. The district court specifically found that "the grand jury subpoena was issued for the purpose of directing William Frank Newman to appear before the grand jury" (Pet. App. 6), and that it was not relevant that an additional reason for the issuance of the subpoena might be discerned. The court of appeals upheld that conclusion, noting that the subpoena was directed not to petitioner but to Newman, a legitimate witness, who did appear and give relevant testimony before the grand jury. As the court of appeals observed: "[Newman's] appearance was a necessary step in the investigation conducted by the grand jury and the subpoena was appropriately issued to secure his appearance." (Pet. App. 12-13).

The decision in *Durbin* v. *United States*, 221 F.2d 520 (C.A.D.C.), is therefore inapposite. In *Durbin*, which was decided prior to enactment of Section 3501, the court, in reversing the defendant's conviction on other grounds, criticized the government's action in using a subpoena to restrain the defendant's move-

ments indefinitely, or until he made a statement satisfactory to the prosecutor, despite the fact that the grand jury had recessed. By contrast, petitioner's sole complaint here is that a witness was instructed to display his properly issued subpoena in the hope of "stimulating" conversation. The transcripts of the January conversations demonstrate that Newman in fact did no more than show his subpoena to petitioner, who then proceeded to instruct Newman in the false testimony that he should give. In these circumstances, the district court correctly concluded that suppression of the conversations would be unjustified.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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